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No. 82-1684

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,
Appellants,

v.

LONE STEER, INC.,
Appellee.

On Appeal from the United States District Court for the District of North Dakota

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF APPELLEE

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF APPELLEE

This brief amicus curiae of the Equal Employment Advisory Council ("EEAC") is submitted with the consent of all parties, and in support of the Appellee, Lone Steer, Inc. Their consents have been filed with the Court Clerk.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, in-

cluding both individual employers and trade and industry associations. The Council is governed by a board of directors which is composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. The members of the Equal Employment Advisory Council are firmly committed to the principle of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of the Fair Labor Standards Act (29 U.S.C. § 211, et seq.) ("FLSA"). They are also subject to the Equal Pay Act (29 U.S.C. § 206), and the Age Discrimination in Employment Act (29 U.S.C. § 621 et seq.) ("ADEA"). Sections 11(a) and 9 of FLSA, the statutory provisions here in question, govern not only FLSA investigations, but also investigations under the Equal Pay Act and the ADEA.[1] Thus, EEAC's members have a direct interest in the issue presented for the Court's consideration in this case, i.e., whether

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[1] The Equal Pay Act amended FLSA. ADEA incorporates Sections 11(a) and 9 of FLSA by reference. 29 U.S.C. § 626(a). This point is not mentioned by the Government either in its brief in this case or in its Jurisdictional Statement. Appellant Secretary of Labor administers and enforces FLSA. Pursuant to President Carter's Reorganization Plan of 1978, responsibility for Equal Pay Act and ADEA administration and enforcement, formerly vested in the Secretary, was transferred to the Equal Employment Opportunity Commission ("EEOC"). Reorganization Plan 1 of 1978, 43 F.R. 19807 (1978).

the statutory investigation scheme established by the Secretary under FLSA violates the Fourth Amendment.

Because of its interest in such issues, EEAC has participated in numerous other cases in this Court involving substantive and procedural issues under legislation governing equal employment opportunity. See, e.g., *County of Washington v. Gunther*, 452 U.S. 161 (1981) (Title VII and Equal Pay Act); *Lorillard v. Pons*, 434 U.S. 98 (1977) (ADEA); *EEOC v. Shell Oil Company*, No. 82-825 (Requirements for Title VII Commissioner's charge); *EEOC v. Associated Dry Goods*, 449 U.S. 590 (1981) (EEOC disclosure regulations); and *Chrysler Corp v. Brown*, 441 U.S. 281 (1979) (OFCCP policy on disclosure of business information).

STATEMENT OF THE CASE

On January 6, 1982,[2] Al Godes, a compliance officer of the Secretary's Wage and Hour Division, telephoned the Lone Steer motel and restaurant in Steele, North Dakota, and informed its manager that he would commence a wage and hour investigation the next morning. Godes told the manager to have available the wage and payroll records for all employees for the past two years. Thereafter, on January 12, Lone Steer's counsel wrote Godes, stating that permission to conduct the investigation would be denied until Godes revealed whether the investigation was prompted by a specific complaint. If not, and if a general wage and hour investigation was planned, Godes was asked to state the scope of the investigation.

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[2] All dates are in 1982 unless otherwise indicated.

On January 20, appellant Loren E. Gilbert, the Secretary's Regional Wage and Hour Administrator in Denver, Colorado responded in a letter to appellee's counsel. Gilbert's letter stated, *inter alia*,

> Under Section 11 of the Act (29 U.S.C. 211), the Secretary may institute an investigation whether or not a complaint has been filed and, thus, *the motive for the investigation will not be given* . . .
>
> Generally the scope of an investigation in any case consists of reviewing records, making transcriptions of records, and interviewing employees. Other facts and matters may be investigated when appropriate to determine the firm's compliance with the Fair Labor Standards Act.
>
> I have instructed Mr. Godes to initiate *this investigation* on Tuesday, February 2, 1982 at 10:30 a.m. at Lone Steer's offices in Steele, North Dakota. If the firm intends to prohibit him from making *this investigation* at that time, please let me know so that I can request an *administrative subpoena in order to conduct the investigation.* (Emphasis added).

Upon receiving the letter, Lone Steer's counsel telephoned Gilbert and advised him that Godes would be denied permission to conduct the investigation. Nevertheless, on February 2, Godes and another investigator entered the Lone Steer establishment and attempted to conduct the investigation. When they were denied permission, Godes served an administrative subpoena duces tecum on Lone Steer. The administrative subpoena was issued in Washington, D.C. on January 28, over the signature of the Administrator of the Secretary's Wage and Hour Division, William Otter.

On February 8, Lone Steer's counsel telephoned the Secretary's Regional Counsel in Denver, Colorado and stated that Lone Steer would not acknowledge and comply with the administrative subpoena. This message was confirmed in a letter of February 10.

The subpoena requested that an officer, agent or employee having custody and personal knowledge of Lone Steer's records appear to testify regarding Lone Steer's wage practices and to produce certain records at the Secretary's Wage-Hour office in Bismarck, North Dakota. The records requested were among those which employers are required to keep under FLSA.

Lone Steer challenged the constitutional validity of the investigation by commencing this action against the Secretary, Godes and Gilbert in the United States District Court for the District of North Dakota. In its amended complaint, Lone Steer sought to enjoin the Secretary and his agents from "entering [Lone Steer's] premises or seizing any of [its] property with an administrative [s]ubpoena, without obtaining a warrant." Lone Steer also sought a declaratory judgment that FLSA "is unconstitutional insofar as it purports to authorize a warrantless inspection of records by way of administrative subpoena after entry to inspect has been denied." The Secretary petitioned the court to compel Lone Steer to comply with the subpoena.

On stipulated facts and cross-motions for summary judgment, the district court determined that this Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) applies to investigations under Section 11 of FLSA. The district court held, therefore,

> that the Secretary of Labor may *not* proceed to enter upon the premises of Lone Steer, Inc. for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act without first having obtained a valid warrant.

Thereafter, the Secretary moved the district court to modify or amend its order so as to enforce the Secretary's administrative subpoena. The district court denied the Secretary's motion without explanation.

SUMMARY OF ARGUMENT

In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), this Court found that the Constitution curbs the Secretary's "unbridled discretion" to select employers for investigation under Section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a), by requiring the Secretary to obtain a warrant to inspect nonconsenting employers. The Court held that to obtain a warrant, the Secretary must show that the employer was selected based on a legislative or administrative plan, premised on specific, neutral criteria. The Court also rejected the contention that in conducting an OSHA investigation, the Secretary may obtain access to all records and documents which the employer is required to maintain under OSHA. The Court emphasized that under the Fourth Amendment, it is important to delineate the scope of a request, especially where documents are involved.

Lower courts have construed *Barlow's* to modify the traditional criteria of reasonableness under the Fourth Amendment. Thus, an investigation under Executive Order 11246, although found to be for a lawful purpose and properly limited in scope, was not allowed absent proof that the business had been selected on the basis of specific, neutral criteria. *United*

States v. Mississippi Power & Light Co., 638 F.2d 907 (5th Cir. 1981), *cert. denied*, 454 U.S. 892. Also, a subpoena duces tecum sought by the Secretary under OSHA Section 8(b) was enforced only upon a showing that the employer had been chosen on the basis of a neutral plan, and that the subpoena was narrowly limited in scope. *Donovan v. Union Packing Co. of Omaha*, —— F.2d ——, 11 BNA OSHC 1648 (8th Cir. 1983) (not officially reported).

The rationale of *Barlow's* logically requires that these same safeguards be applied to the subpoena procedure established by Sections 11(a) and 9 of FLSA, because this enforcement scheme contains virtually no privacy guarantees for the business owner. The statute, the Secretary's regulations, and the Secretary's enforcement practices in this case show that the Secretary has no plan for determining which businesses to investigate, and that the business owner has no notice of when such investigations are likely to occur. Accordingly, this Court should make clear that when a district court is requested by the Secretary to enforce an FLSA subpoena, the Secretary must show that the subpoena not only is authorized by statute and is properly limited in scope, but also that the target of the subpoena was chosen on the basis of specific, neutral criteria, as articulated in *Barlow's*. The same showing logically would be required for subpoenas issued under the Equal Pay Act and Age Discrimination in Employment Act, since both of those statutes incorporate the investigatory scheme of FLSA Section 11(a) and 9.

The established authorities confirming the validity of the Secretary's subpoena power under FLSA require no different result. As the lower courts' deci-

sions subsequent to *Barlow's* have demonstrated, the traditional tests of Fourth Amendment reasonableness laid down by those authorities still apply. They are amplified, however, by the Court's analysis in *Barlow's*.

Applying the pertinent test of reasonableness to the instant case, it is not clear from the instant record why the appellee was selected as an investigatory target; indeed, the agency specifically declined to give its reasons for investigating the appellee. It thus cannot be clear whether the scope of the subpoena is limited to that which is relevant to the purpose of the investigation. Even if a warrant is not required, the Court, nevertheless, should not merely permit the investigation to proceed. Rather, it should remand the case to the district court with instructions to apply the substantive requirements of *Barlow's*. The district court would then inquire whether the appellee was selected for investigation pursuant to valid, neutral criteria, and into whether the scope of the subpoena is limited to documents relevant to the reason appellee was chosen. If the agency cannot satisfy these requirements, the investigation cannot go forward.

ARGUMENT

I. THE SUBSTANTIVE REQUIREMENTS OF *BARLOW'S* SHOULD BE APPLIED TO THE FLSA SUBPOENA PROCEDURE

A. Even if an Administrative Subpoena Enforcement Procedure Provides Procedural Safeguards Equivalent to a Warrant, the Subpoena Nevertheless Cannot Be Enforced Unless the Investigating Agency Satisfies the *Barlow's* Standards.

The Government would confine the Court's consideration of the applicability of *Marshall v. Barlow's Inc.* in this case to the question of whether a warrant is required as a precondition to a subpoena under the FLSA. That question is addressed by the appellee in its brief. EEAC's concern as *amicus curiae*, however, is that apart from the issue of a search warrant, business owners are entitled to assurance through the subpoena process that they will be selected for wage and hour, equal pay and age discrimination investigations on the basis of specific, neutral criteria and that the scope of administrative subpoenas issued in such investigations will be limited strictly to achieving legitimate purposes.

As *Barlow's* indicated, "[d]elineating the scope of a search with some care is particularly important where documents are involved." 436 U.S. at 324 n.22. This Court also specifically rejected the government's position that the *Barlow's* standards should not be applied to records which were within the government's statutory power to review, or which were required to be kept pursuant to agency regulations. The government's brief provides no compelling reason why those standards should not be applied to FLSA investigations which, as shown below (Section C), are pursuant to statutory investigatory authorization

that is even broader than that permitted by the OSHA construed in *Barlow's*.

Moreover, it is beside the point for the government to argue that the subpoena enforcement procedure provides safeguards that are the equivalent of a *Barlow's* search warrant procedure. As the Fifth Circuit has indicated, even if the administrative procedure provides such equivalent safeguards, the agency nevertheless must establish in such proceedings that the employer was selected by the use of specific neutral criteria. See *United States v. Mississippi Power & Light Company, supra*, 638 F.2d at 907-08 (". . . these three [*Barlow's*] elements are essential" to a request for documents under Executive Order 11246).

As shown below, the concerns expressed by the Court in *Barlow's*, and the standards established to satisfy those concerns, are directly applicable to subpoena enforcement proceedings conducted pursuant to Sections 11 and 9 of the FLSA.

B. Under *Barlow's*, an Agency Does Not Have the Authority to Request Employer Records Unless it Can Establish that the Employer Was Selected for Inspection Pursuant to an Administrative Plan Containing Specific, Neutral Criteria.

In *Barlow's*, this Court held that absent consent, a warrant is constitutionally required in order to conduct an administrative inspection under Section 8(a) of the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 657(a). The Court found that OSHA "fails to tailor the scope and frequency of such administrative inspections to the particular health and safety concerns posed by the numerous and varied businesses regulated by the statute." *Donovan v. Dewey*, 452 U.S. 594, 601 (1981). Instead, Section

8(a) of OSHA purports to authorize inspections "of any . . . establishment . . . where work is performed by an employee of an employer," and purports to authorize investigators to search "any such place of employment and all pertinent conditions . . ., and to question privately any such employer, owner . . . or employee." 29 U.S.C. § 657(a). Additionally, the statute was found to contain no "standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search." *Id.*

Upon evaluating this statutory scheme, the Court determined that the provision authorizing warrantless inspections "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." *Barlow's, supra*, 436 U.S. at 323. The Court thus concluded that a warrant is required by the Fourth Amendment "to assure a nonconsenting owner, who may have little real expectation that his business will be subject to inspection, that the contemplated search was 'authorized by statute, and . . . pursuant to an administrative plan containing specific neutral criteria.'" *Donovan v. Dewey, supra*, 452 U.S. at 601, quoting *Barlow's, supra*, 436 U.S. at 323.

Additionally, although the Secretary's power to issue a subpoena for records under OSHA Section 8(b), 29 U.S.C. § 657(b) was not directly in issue, the Court specifically addressed the Secretary's claim that he is entitled to perform a broad search of an employer's records when performing an investigation under Section 8(a). The Secretary had asserted that he may inspect without a warrant all records which an employer is required to keep under the OSHA stat-

ute, or under regulations which the Secretary has promulgated.[3] As previously noted, the Court expressly rejected this argument, stating that "[d]elineating the scope of a search with some care is particularly important where documents are involved." 436 U.S. at 323 n.22.

The Court's ultimate conclusion in *Barlow's* was that the OSHA statute "is unconstitutional insofar as it purports to authorize inspections without a *warrant or its equivalent. . . .*" 436 U.S. at 324. (Emphasis added). Subsequent to *Barlow's*, the Fifth Circuit has reasoned, in a case involving the Secretary's right to inspect documents incident to an investigation under Executive Order 11246, that where an investigative scheme contains the "equivalent" of the warrant procedure, a warrant may not be required as a precondition for an investigation. The Fifth Circuit held that where a statutory or regulatory scheme provides for resort to a federal court before inspection is forced upon an establishment, the inspection procedure provides a forum for evaluating the reasonableness of the investigation, rendering the warrant process unnecessary. *United States v. Mississippi Power & Light Co., supra*, 638 F.2d at 907.

The same court made clear, however, that the substantive requirements of *Barlow's* still must be satis-

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[3] Section 8(c) of OSHA, 29 U.S.C. § 657(c), provides, *inter alia*, that an employer must "make, keep and preserve and make available to the Secretary [of Labor] . . ." records relating to the employer's activities under OSHA as may be required by regulations issued by the Secretary to effectuate the purposes of the OSHA statute. These records may include documents such as reports on work-related illnesses or injuries, or information on employees' medical history. *See, e.g.*, 29 C.F.R. 1910.20 (1982).

fied as to the inspection involved. Thus, where the Secretary requests a federal district court to compel an employer to permit an inspection of records pursuant to an administrative investigation, the district court must determine whether the investigation being sought satisfies "the broad fourth amendment test of 'reasonableness.'" *Id.* quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-39 (1967). As the Fifth Circuit stated:

> The proper elements of such an inquiry necessarily must vary with the nature and circumstances of the search that is desired, although *Barlow's* gives some general guidance to the district court. One element of the question is whether the proposed search is authorized by statute, and a second is whether it is properly limited in scope. 436 U.S. at 323. * * * A third element should be an examination of how the agency chose to initiate this particular search. The search will be reasonable if based either on (1) specific evidence of an existing violation, (2) 'a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]' ". 436 U.S. at 320-21 * * *, or (3) a showing that the search is 'pursuant to an administrative plan containing specific neutral criteria.' 436 U.S. at 323 * * * It is important that 'the decision to enter and inspect . . . not be the product of the unreviewed discretion of the enforcement officer in the field. See v. [City of] Seattle, 387 U.S. 541, 545 (1967). * * * *Id.* at 907-08.

As noted, the specific question before the Fifth Circuit was the constitutional reasonableness of a re-

quest by the Secretary for access to an employer's records in order to assess compliance with Executive Order 11246. Applying the criteria quoted above, the court found that the request was within the Secretary's statutory authority, and that it was properly limited in scope because it was restricted "solely [to] business records to test compliance with the affirmative action program." 638 F.2d at 908. The court, however, found the record before it insufficient to determine whether the third criterion had been satisfied, i.e., that the request had been pursuant to an administrative plan containing specific, neutral criteria. In the absence of such proof, the Fifth Circuit would not approve the investigation and instead remanded the case to the district court for a determination on the point. *Id.*

Recently, the Eighth Circuit has applied the substantive requirements of *Barlow's* specifically to an administrative subpoena duces tecum requested by the Secretary in connection with an OSHA investigation. *Donovan v. Union Packing Co. of Omaha, supra.* Pursuant to Section 8(b) of OSHA, the Secretary sought enforcement of a subpoena seeking access to an employer's records of occupational injuries and illnesses to its workforce, workmen's compensation claims, and the number of employees and number of hours worked. The court rejected the argument that the Secretary must obtain a warrant to gain access to such records by means of a subpoena. Nevertheless, the court applied the substantive requirements of *Barlow's* and examined whether the Secretary's request for the subpoena was based on specific "neutral criteria." 11 BNA OSHC at 1651.

Applying the *Barlow's* criteria, the court approved the subpoena on narrow grounds. Thus, the court first found that the Secretary had selected the particular employer for a preliminary investigation of its accident and illness rate in accordance with the Secretary's plan for "programmed inspections." Under this plan, a workplace was selected for an inspection if it was a member of what the Secretary identified as a high hazard industry, and its lost workday injury rate exceeded a certain average rate. *Id.* The Eighth Circuit found that "[because] Union Packing Company's records were sought based on the neutral criteria that the company was a member of a high hazard industry, the evils the Supreme Court sought to guard against in *Barlow's* are simply not present." *Id.*[4]

Thus, even in the context of a "high hazard" industry, the Eighth Circuit only approved the document request because "the request for documents . . . [was] much narrower than that involved in *Barlow's*." 11 BNA OSHC at 1651. The court also stressed the language in *Barlow's* in which the Supreme Court rejected the Secretary's position that "records required by the Act" and "any additional records" an OSHA in-

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[4] The sufficiency of the Secretary's high hazard industry program as a basis for selecting investigation targets under OSHA has been a subject of judicial debate. *See, e.g.*, In the Matter of Establishment Inspection of Northwest Airlines, Inc., 587 F.2d 12 (7th Cir. 1978); Weyerhaeuser Co. v. Marshall, 592 F.2d 373, 378 (7th Cir. 1979); In the Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co., —— F. Supp. ——, 5 BNA OSHC 1375 (N.D. Ill. 1977), aff'd 589 F.2d 1335 (7th Cir.), cert. denied, 444 U.S. 884 (1979). For the instant purpose, however, the point is that the Eighth Circuit applied the *Barlow's* test of whether the employer had been selected to receive a subpoena on a specific, neutral basis.

spector requests may be inspected without compliance with the neutral criteria standard. *Id. A fortiori*, where, as in the instant case, the FLSA inspector refuses to disclose the motive for the administrative search or records request, the *Barlow's* rationale would bar the request to inspect the documents.

C. The FLSA Enforcement Scheme Presents the Precise Evils of "Unbridled" Administrative Discretion Which the *Barlow's* Requirements Are Intended to Curb.

In *Barlow's*, the Court indicated that whether the rationale of that decision would be extended to statutes other than OSHA would depend on the specific enforcement needs and privacy guarantees of each statute. 436 U.S. at 321. Applying this test, it is clear that the *Barlow's* rationale should be extended to FLSA, since the FLSA enforcement scheme contains even less privacy guarantees for commercial establishments than did OSHA before *Barlow's*. Section 8(a) of OSHA contains at least a modicum of limiting language, in that it requires the Secretary's investigations to be performed "at reasonable times and within reasonable limits and in a reasonable manner." 29 U.S.C. § 657(a). No such language, however, appears in FLSA Section 11(a). Rather, that provision authorizes the Secretary to "enter and inspect such places *and such records* . . . question such employees, and investigate such facts, conditions and practices or matters as he may deem necessary or appropriate to determine whether any person has violated [FLSA]." 29 U.S.C. § 211(a) (Emphasis added). Section 9 of FLSA, which specifically confers subpoena power upon the Secretary, likewise contains no limiting language; it simply makes applicable to FLSA investiga-

tions the subpoena procedure of 15 U.S.C. 49 and 50. 29 U.S.C. § 209. This absence of statutory limits on the Secretary's discretion makes it all the more compelling that business owners have a means to assure that FLSA investigations will be pursuant to an administrative plan containing specific, neutral criteria.

The need to apply such standards to the Secretary's FLSA subpoena power in particular is all the more apparent inasmuch as the investigation procedure developed by the Secretary contains no investigatory plan or criteria, and gives business owners no notice as to when they can expect to be the subject of an FLSA investigation. The regulations promulgated by the Secretary are silent on how the Secretary will select targets for FLSA subpoenas. Instead, consistent with the broad statutory grant of discretion, the regulations purport to arrogate to the Secretary the greatest possible latitude, providing that a business owner's "records shall be open at any time to inspection and transcription by the [Wage and Hour] Administrator or his . . . representative." 29 C.F.R. § 516.7(b) (1982).[6] In addition, the stipulated facts in this case illustrate that the Secretary interprets and applies his authority under FLSA so as to refuse flatly to disclose to business owners the reason they are chosen for investigation. Thus, when appellee's counsel inquired as to the reason appellee was selected, appellant Gilbert wrote appellee that "the motive for the investigation will not be given" (Jurisdictional Statement 3a-3b).

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[6] Significantly, the regulations promulgated by EEOC to implement the Equal Pay Act and ADEA are equally silent on how targets for investigation will be selected. See 29 C.F.R. § 1620.19 (1982) (Equal Pay Act); 29 C.F.R. 1626.15 (1982) (ADEA).

In sum, the FLSA investigatory scheme as exemplified by the Secretary's use of the subpoena power in this case presents precisely those vices which the Supreme Court sought to eliminate in *Barlow's*. In FLSA, "Congress has authorized inspection but made no rules governing the procedures that inspectors must follow. . . ." Accordingly, "the Fourth Amendment and its various restrictive rules apply." *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970). EEAC, therefore, urges the Court to make clear that when the Secretary seeks to enforce an administrative subpoena duces tecum pursuant to FLSA Sections 11(a) and 9, the district court should apply *Barlow's* and require the Secretary to show that the subpoena satisfies Fourth Amendment requirements, including, in particular, that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to [the] particular [establishment]." *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967); *United States v. Mississippi Power & Light Co., supra.*[6]

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[6] The same test should be applied by a district court to an administrative subpoena *duces tecum* issued by EEOC to investigate Equal Pay Act and ADEA violations, since both statutes incorporate section 11 of the FLSA.

Such a ruling, moreover, would accord with proper administration of Title VII, 42 U.S.C. § 2000e, *et seq.* (1980). Under Title VII of the Civil Rights Act of 1964, a valid charge of prohibited discrimination is a condition precedent to the investigatory authority of EEOC. See EEOC v. Shell Oil Co., 676 F.2d 322 (8th Cir. 1932), *pet. for cert. granted*, No. 82-825. Section 706(b) of Title VII mandates that an employer who is charged with violating Title VII must be given notice of the "date, place and circumstances of the alleged violations." Also, EEOC's own regulations require a "clear and concise statement of the facts, including pertinent dates, constituting

II. THE GOVERNMENT'S ARGUMENT THAT AN AGENCY MAY INSPECT ANY DOCUMENTS RELATED TO A STATUTORY ENFORCEMENT SCHEME FAILS TO CONSIDER DIRECTLY CONTRARY LANGUAGE IN *BARLOW'S* AND MISCONSTRUES OTHER CASE AUTHORITY

In *Oklahoma Press Publishing Company v. Walling*, 327 U.S. 186 (1946), the Court affirmed the Secretary's subpoena authority under FLSA. The Court held that for constitutional purposes, "[i]t is not necessary . . . that a specific charge or complaint of violation of law be pending or that the order [enforcing a subpoena] be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." 327 U.S. at 209. The requirement of " 'probable cause' ", the Court said,

> is satisfied, in that of an order for production, by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particu-

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the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3).

As compared with the strict requirements of Title VII and EEOC's implementing regulations, the broad discretion afforded the EEOC investigators under FLSA Sections 11(a) and 9 provides a tempting means to circumvent the limitations on investigations which Title VII imposes. The opportunity to utilize the investigatory license of ADEA and the Equal Pay Act to search for evidence of Title VII violations is manifest. The imposition of the substantive requirements of *Barlow's* on subpoenas issued under the Equal Pay Act and ADEA would diminish the likelihood of such investigatory abuse.

> larity in 'describing the place to be searched, and the person or things to be seized,' * * * comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. *Id.* (Footnote omitted).

Far from sanctioning any and all FLSA investigations, *Oklahoma Press* recognized that relevancy, adequacy and "excess in breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry." 327 U.S. at 209. Obviously, the *Barlow's* decision, rendered almost four decades later, fills the gaps recognized by the *Oklahoma Press* holding.

In *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), the Court construed the power of the Federal Trade Commission to compel corporations to file reports concerning their compliance with a cease and desist order. As noted above, FLSA Section 9 incorporates the provisions of the Federal Trade Commission Act governing the use of subpoenas duces tecum. The Court in *Morton Salt* held that the reporting requirement was valid, stating the agency could conduct an investigation of the compliance records even if the request was prompted by "nothing more than official curiosity." 338 U.S. at 652. But the question presented in the instant case—the authority of the agency to initiate an investigation without giving reasons for doing so—was not even within the contemplation of the *Morton Salt* opinion. The latter dealt only with the agency's continuing supervisory authority over a proven violator of the Federal Trade Act. *Morton Salt* thus would not inhibit the application of the *Barlow's* standards to FLSA investigations *ab initio*.

Appellants rely heavily in their brief on *Oklahoma Press, Morton Salt* and their progeny to establish that the district court below improperly required the Secretary to obtain a search warrant in order to enforce the subpoena duces tecum. The appellants' argument, however, does not address the point which EEAC desires to emphasize. The question here is not only whether the procedure of a warrant is necessary to protect the privacy interests of the business owner subjected to a subpoena. It may be assumed for the purpose of our argument that because the Secretary must file a civil action in federal court to enforce an FLSA subpoena under 15 U.S.C. § 49, an adequate forum for the business owner to assert his privacy interests is provided. See *Donovan v. Dewey, supra*, 452 U.S. at 604-05. The crucial question from EEAC's viewpoint is whether a district court which is requested to enforce a subpoena will require the Secretary to show that his investigatory target was chosen on the basis of specific, neutral criteria.

EEAC submits that the holdings of *Oklahoma Press* and *Morton Salt* must be read alongside *Barlow's*, which logically requires that a district court requested to enforce an administrative subpoena apply several tests of reasonableness. Thus, after *Barlow's* it can no longer logically be enough that a subpoena is authorized by statute, for a purpose which Congress may authorize. (Brief for Appellants at 12). Such a subpoena may be unconstitutional if its issuance "is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." *Barlow's, supra*, 436 U.S. at 323. Similarly, after *Barlow's*, it can no longer logically be sufficient that the records which

the Secretary seeks in the subpoena be those which the particular statute and implementing regulations require the business owner to maintain. (Brief for Appellants at 18).[7] Such subpoena would be constitutionally overbroad, for "[d]elineating the scope of a search with some care is particularly important where documents are involved." 436 U.S. at 324 n.22. And finally, if anything is clear after *Barlow's*, it is that the Secretary may not issue a subpoena just to satisfy "nothing more than official curiosity." *United States v. Morton Salt Co., supra*, 338 U.S. at 652 . Plainly, the investigation must be based on a reasonable legislative or administrative plan, and on specific neutral criteria. *Barlow's, supra.*

To be sure, the rationale of *Barlow's* does not mean that the traditional tests of reasonableness under the Fourth Amendment have lost their vitality. It remains crucial that the subpoena is authorized by statute, and is properly limited in scope. *United States v. Mississippi Power & Light Co., supra*, 638 F.2d at 907. In light of *Barlow's*, however, "a third element should be an examination of how the agency

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[7] Clearly, the record here indicates that the employer emphatically refused to consent to the administrative search of its records. More generally, the courts have made clear that employers cannot be presumed to have consented to a records search (or to have waived the right to object to such a search) merely because they do business in an area in which government regulations require records to be kept. Federal contractors, and employers generally, are subject "only to those reviews which employ reasonable searches as that term is defined under the Fourth Amendment [and by *Barlow's*]." First Alabama Bank of Montgomery v. Donovan, 692 F.2d 714, 718-20 (5th Cir. 1982) (Executive Order 11246). *See also* United States v. Mississippi Power & Light, *supra*, 639 F.2d at 906-07.

chooses to initiate th[e] particular [investigation]." *Id.* The district court "may find other questions relevant to the reasonableness of the proposed [document request] under the Fourth Amendment, but *these three elements, at least, are essential.*" *Id.* at 908.[8]

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[8] The post-*Barlow's* decisions of the lower courts upon which appellants rely are inapposite to the point which EEAC here emphasizes. Thus, in EEOC v. Bay Shipbuilding Corp., 668 F.2d 304 (7th Cir. 1981), the court addressed *Barlow's* only on the question whether EEOC was required to demonstrate "probable cause" in order to enforce a subpoena. There was no dispute as to the reason EEOC investigated the employer involved; a former employee had filed a charge of discrimination. 668 F.2d at 306. In Re Grand Jury Proceedings, 601 F.2d 162 (5th Cir. 1979), provides no support to appellants' position since the court actually refused to enforce the subpoenas in question because they were overbroad, and because they also inquired into matters protected by the attorney-work product doctrine. In Marshall v. Walbridge, 84 Lab. Cas. (CCH) para. 33,723 (N.D. Ind. 1978), two employees had filed complaints with the Secretary's Wage and Hour Division asserting that they had not been paid proper overtime; thus a specific reason for the FLSA investigation was established. In Marshall v. Stevens People & Friends for Freedom, 669 F.2d 171 (4th Cir.), cert. dismissed, 455 U.S. 930 (1982), there was no question over the reason that the individuals and committees subpoenaed were chosen for investigation under the Labor Management Reporting and Disclosure Act. The statute contains affirmative obligations to disclose information concerning efforts to persuade employees in the exercise of their collective bargaining rights, and the targets of the subpoenas had stated their intent to convince the employees of J.P. Stevens Co., Inc. to oppose unionization. 669 F.2d at 173. In Donovan v. Shaw, 668 F.2d 985 (8th Cir. 1982), there again was no question why the pension fund in issue was chosen for investigation under ERISA; the fund had requested a determination from the Internal Revenue Service that it remain tax exempt notwithstanding certain changes in the ERISA statute. 668 F.2d at 987. Finally, in

III. EVEN IF A WARRANT IS NOT REQUIRED, THE GOVERNMENT'S INSPECTION CANNOT PROCEED WITHOUT A REMAND TO THE DISTRICT COURT FOR A DETERMINATION ON THE REASONABLENESS OF THE SUBPOENA

Applying the three elements of reasonableness set forth by the Fifth Circuit in *United States v. Mississippi Power & Light* to the subpoena here, it it is apparent that the first test, which is one of law, has been satisfied; the subpoena was issued within the Secretary's statutory authority under FLSA Sections 11(a) and 9. 638 F.2d at 908. The second and third tests, however, cannot be satisfied on this record.

The second test, also deemed one of law by the Fifth Circuit, is whether the subpoena is properly limited in scope. *Id.* This question, however, depends in turn on the reason for the investigation, i.e., on the reason why the instant appellee was chosen for inquiry by the Secretary. As noted in the Statement of Facts, the Secretary expressly refused to inform the appellee why it was chosen, and the record does not otherwise reveal the reason.

EEAC submits, therefore, that even if a warrant is not required, this Court should not merely permit the investigation to proceed. Rather, the case should be remanded to the district court with specific in-

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Donovan v. Mehlenbacher, 652 F.2d 228 (2d Cir. 1981), it was clear that the Secretary decided to investigate the farming operation involved because of the history of two of the farmer's labor contractors, and because of a newspaper report on the conditions at the farm. 652 F.2d at 229.

In sum, none of these authorities support the proposition that the *Barlow's* substantive requirements are not to be applied when a district court is determining whether to enforce an FLSA subpoena duces tecum.

structions. First, the district court should be instructed to inquire into the factual question of why the Secretary chose the appellee for investigation. *Id.* The Court should make clear that the test to be applied on this point is the one articulated in *Barlow's*, i.e., that the appellee must have been chosen on the basis of specific, neutral criteria. The district court should further be instructed that if it is satisfied that appellee was chosen on a basis which satisfies this Court's concerns in *Barlow's*, a careful evaluation of the scope of the subpoena should next be made. As did the Eighth Circuit in *Donovan v. Union Packing Co. of Omaha*, *supra*, the district court should approve the subpoena only to the extent that its scope is strictly limited to accomplishing the specific, revealed purpose of the investigation. Circumscribing overbroad subpoenas is as important in protecting the privacy rights of business owners as is assuring that a rational basis underlies selection of investigatory targets. If the agency cannot satisfy these requirements, the investigation cannot be permitted to proceed.

CONCLUSION

For the reasons stated above, and given the state of the instant record, EEAC respectfully submits that should a *Barlow's*-type warrant not be required, the Court should remand the case to the court below with instructions to apply the substantive requirements of *Barlow's* to any subsequent enforcement proceeding.

Respectfully submitted,

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